Public Prosecutor v Dato' Waad bin Mansor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–21 OF 2003 (N)
ABDUL MALEK AHMAD PCA, SITI NORMA YAAKOB AND ALAUDDIN FCJJ
4 JANUARY 2005

Criminal Procedure — Sentence — Corruption — Whether imprisonment should be given — State legislative council member sitting in committee approving land application he had interest in — Premeditation to commit corrupt act — Public interest considered — Deterrent sentence — Objective of Ordinance — Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)

The appellant was charged for three offences of committing corrupt practice under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('the Ordinance'). At all relevant times, the respondent was a member of the Dewan Undangan Negeri ('ADUN') and Majlis Mesyuarat Kerajaan ('MMK') and the Tampin District Land Committee. The respondent had on all three occasions sat with the said committees in approving the land application submitted by Syarikat Teraju Nusantara Sdn Bhd ('Teraju Nusantara'), which was set up, *inter alia* by his wife. The respondent was also involved with the members of Teraju Nusantara to subsequently sell the approved land to a third party where the respondent was paid RM150,000. The learned High Court judge acquitted and discharged the respondent on all charges. The Public Prosecutor appealed to the Court of Appeal. The Court of Appeal allowed the Public Prosecutor's appeal and convicted the respondent on all three amended charges. The respondent was sentenced to a fine of RM15,000 in default six month's imprisonment on each amended charge. The Public Prosecutor appealed again, this time against the sentences imposed by the Court of Appeal.

Held, allowing the appeal, substituting the fine with sentence of two years imprisonment on each amended charge:

(1) The very purpose for which the Ordinance was designed was to curb corrupt practices of members of the administration which could by itself threaten the security of the country (see para 43). Every form of corrupt practice that falls within the definition of the Ordinance is a threat to national security, even though they may not be threats to public order, a factor which the Court of Appeal had overlooked in its judgment (see para 44). By stating that the crime of corruption stands in a league of its own and cannot be equated with the heinous crimes of murder, rape, robbery, criminal breach of trust etc, the Court of Appeal had certainly underplayed the effect of corruption in our society (see para 46).

(2) From the sequence of events that took place, ie from the inception of Teraju Nusantara, the application and approval of the land for quarry

purposes and finally the sale of Teraju Nusantara, it was obvious that it was a well thought out scheme by the respondent. There was clear evidence of premeditation and his part to commit a corrupt act (see para 69). The parts played by the respondent in his capacity as an ADUN and a member of the MMK in the series of meetings held to consider and approve the application of Teraju Nusantara for quarry operations showed that financial advantage was foremost in the mind of the respondent. This fact was clearly supported by the evidence of the sale of the land to a third party five months after the final approval was obtained (see para 70).

(3) In cases of corruption it is difficult to envisage a situation where public interest does not require the principle of deterrence to predominate (see para 71). The Court of Appeal had placed much emphasis on the fact that the respondent's political career was destroyed, the positions he once held lost and possibly never to be recovered and his good name tarnished. These certainly should not have an overwhelming effect on the sentencing process as held by the Court of Appeal (see para 73). The aim of the Ordinance is to bring to book renegade politicians and public servants who abuse their positions. The effect of any punishment imposed is to deter politicians and public servants from conducting their public affairs in a corrupt manner (see para 74).

(4) In cases involving corruption, imprisonment would be a proper sentence unless there were extenuating circumstances against the imposition of such a sentence. There were none in this case (see para 76).

[Bahasa Malaysia summary

Perayu dituduh dengan tiga kesalahan melakukan perbuatan rasuah di bawah s 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) No 22 tahun 1970 ('Ordinan tersebut'). Pada semua masa yang relevan, responden adalah seorang Ahli Dewan Undangan Negeri ('ADUN') dan Majlis Mesyuarat Kerajaan ('MMK') dan ahli jawatankuasa Tanah Daerah Tampin. Responden telah pada ketiga-tiga masa tersebut duduk di dalam jawatankuasa-jawatankuasa tersebut yang meluluskan permohonan tanah yang dibuat oleh Syarikat Teraju Nusantara Sdn Bhd ('Teraju Nusantara'), sebuah syarikat yang ditubuhkan oleh isterinya. Responden juga terlibat dengan ahli-ahli Teraju Nusantara yang kemudiannya menjual tanah yang diluluskan itu kepada satu pihak ketiga yang mana telah membayar RM150,000 kepada responden. Yang arif Hakim Mahkamah Tinggi membebaskan dan melepaskan responden dari kesemua pertuduhan. Pendakwa Raya merayu ke Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan Pendakwa Raya dan responden disabitkan dengan ketiga-tiga tuduhan terpinda. Responden dihukum denda sebanyak RM15,000 dan jika ingkar, enam bulan penjara untuk setiap satu pertuduhan

terpinda. Sekali lagi, Pendakwa Raya merayu, pada kali ini terhadap hukuman yang dikenakan oleh Mahkamah Rayuan.

Diputuskan, membenarkan rayuan, menggantikan hukuman denda dengan hukuman penjara dua tahun untuk setiap tuduhan terpinda:

(1) Tujuan utama Ordinan tersebut dicipta adalah untuk mengawal amalan-amalan rasuah di kalangan ahli-ahli pentadbiran yang mana menggugat keselamatan negara (lihat perenggan 43). Setiap bentuk rasuah yang tertakluk di dalam tafsiran Ordinan tersebut adalah satu ancaman kepada keselamatan negara, walaupun ia mungkin tidak mengancam ketenteraman awam, satu faktor yang terlepas pandang oleh Mahkamah Rayuan di dalam penghakimannya (lihat perenggan 44). Dengan menyatakan yang jenayah rasuah tidak boleh disamakan dengan jenayah kejam seperti pembunuhan, rogol, rompakan, pecah amanah jenayah dan sebagainya, Mahkamah Rayuan tentu sekali meringankan kesan rasuah di dalam masyarakat kita (lihat perenggan 46).

(2) Dari turutan peristiwa yang berlaku, iaitu dari penubuhan Teraju Nusantara, permohonan dan kelulusan tanah untuk tujuan kuari dan akhirnya penjualan Teraju Nusantara, adalah jelas bahawa ianya adalah satu rancangan yang dirancang secara terperinci oleh responden. Terdapat keterangan yang jelas mengenai rancangan terdahulu pada pihak responden untuk melakukan perbuatan rasuah (lihat perenggan 69). Peranan yang dimainkan oleh responden di dalam tugasnya sebagai ADUN dan ahli MMK di dalam mesyuarat-mesyuarat yang diadakan untuk menimbang dan meluluskan permohonan Teraju Nusantara untuk operasi kuari menunjukkan bahawa kepentingan kewangan adalah paling utama di fikiran responden. Fakta ini jelas disokong dengan bukti penjualan tanah kepada pihak ketiga dalam masa lima bulan selepas kelulusan terakhir diperoleh (lihat perenggan 70).

(3) Di dalam kes-kes rasuah, adalah susah untuk membayangkan satu situasi di mana kepentingan awam tidak memerlukan prinsip pencegahan diutamakan (lihat perenggan 71). Mahkamah Rayuan telah meletakkan terlalu banyak penekanan pada fakta yang kerjaya politik responden terjejas, jawatan-jawatan yang dahulunya dipegang oleh responden telah terlucut dan kemungkinan tidak dapat dikembalikan dan nama baiknya telah tercemar. Ini semua tidak semestinya mempunyai kesan yang amat sangat kepada proses penghukuman sebagaimana yang diputuskan oleh Mahkamah Rayuan (lihat perenggan 73). Tujuan Ordinan tersebut adalah untuk membawa ahli-ahli politik dan kakitangan awam yang menyalahgunakan kedudukannya ke muka pengadilan. Kesan sesuatu hukuman yang dikenakan adalah untuk menghalang ahli-ahli politik dan kakitangan kerajaan dari mengendalikan urusan awamnya dalam cara kecurangan (lihat perenggan 74).

(4) Di dalam kes-kes yang melibatkan rasuah, penjara adalah hukuman yang sewajarnya melainkan terdapat hal keadaan peringan terhadap pengenaan hukuman sebegitu. Ianya tiada di dalam kes ini (lihat perenggan 76).]

Notes

For cases on sentencing involving conviction for corruption, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3296–3307 and 3924–3925.

Cases referred to

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Dato' Seri Anwar Ibrahim v PP [2000] 2 MLJ 486; [2002] 3 MLJ 193 (refd)
Haji Abdul Ghani bin Ishak & Anor v PP [1981] 2 MLJ 230 (refd)
Kang Yeow Hooi & Ors v PP [1954] MLJ 233 (refd)
Lim Poh Tee v PP [2001] 1 SLR 674 (refd)
Nunis v PP [1982] 2 MLJ 114 (refd)
Pendakwa Raya lwn Dato' Waad bin Mansor [2003] 4 MLJ 457 (refd)
Pendakwa Raya v Dato' Waad bin Mansor [1999] MLJU 591(refd)
Pendakwa Raya v Datuk Hj Sahar bin Arpan [1999] MLJU 325; [1999] 3 CLJ 427 (refd)
PP v Dato' Haji Mohamed Muslim bin Haji Othman [1983] 1 MLJ 245 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276 (refd)
PP v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
R v Sargeant (1974) 60 Cr App R 74 (refd)

Legislation referred to

Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)

Appeal from: Criminal Appeal No N–05–65 of 1999 (Court of Appeal, Kuala Lumpur)

Abdul Karim Abdul Jalil (AG's Chambers) for the appellant.
Amir Ismail (Abdul Halim Mohamad with him) (Halim & Ismail) for the respondent.

Alauddin FCJ (delivering judgment of court):

[1] At the High Court in Seremban, the respondent faced three amended charges for offences under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('the Ordinance').

[2] The charges read as follows:

First Amended Charge:

That you on the 21 December 1992 at about 10am at Bilik Gerakan, Tampin District Office, in the State of Negeri Sembilan, being a member of the State Legislative Assembly Gemencheh, Tampin committed corrupt practice by using your public position for your pecuniary advantage in that you did take part in a decision of the District of Tampin Land Committee in which you had an interest, to wit deciding that the application by Syarikat Teraju Nusantara Sdn Bhd to acquire State land at Mukim of Repah, in the District of Tampin comprising of about 20.146 hectares by way of Temporary Occupation Licence (TOL) with permit and four hectares by way of alienation for quarry industries in an application file PTT 1/2/545 be forwarded to the Negeri Sembilan State Executive Council with a recommendation for approval and that you have thereby committed an offence punishable under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970.

Second Amended Charge:

That you on 28 April 1993, at about 10am at Bilik Mesyuarat Majlis Mesyuarat Kerajaan Negeri, in the District of Seremban, in the State of Negeri Sembilan, whilst being a member of the administration, namely a member of the State Executive Council Negeri Sembilan committed corrupt practice by using your public position for your pecuniary advantage in that you did take part in a decision of the said State Executive Council in which you had an interest, to wit the decision to approve alienation of a land by way of State lease for a period of 60 years comprising of about 28.24 hectares in the application file No PTT 1/2/545 for the purpose of quarry industries to Syarikat Teraju Nusantara Sdn Bhd, in Mukim Repah, in the District of Tampin and that you have thereby committed an offence punishable under s 2(1) of the Emergency Ordinance (Essential Powers) Ordinance No 22 of 1970.

Third Amended Charge:

That you on the 26 January 1994, at about 10am at Bilik Mesyuarat Majlis Mesyuarat Kerajaan Negeri, in the District of Seremban, in the State of Negeri Sembilan, whilst being a member of the Administration, namely a member of the State Executive Council of Negeri Sembilan, committed corrupt practice by using your public position for your pecuniary advantage in that you did take part in a decision of the said State Executive Council in which you had an interest, to wit the decision to approve the application for extension of time for the payment of premium for another 6 months for the land comprising of about 28.24 hectares in the application file No PTT 1/2/545 in Mukim Repah, in the District of Tampin, that have been approved to Syarikat Teraju Nusantara Sdn Bhd on 28 April 1993, and that you have thereby committed an offence punishable under s 2(1) of the Emergency Ordinance (Essential Powers) Ordinance No 22 of 1970.

[3] At the close of the case for the defence, the learned High Court judge ('HCJ') acquitted and discharged the respondent on all the three amended charges.

[4] The Public Prosecutor ('PP') appealed to the Court of Appeal ('CA') against the above orders of acquittal and discharge. **A**

[5] The CA allowed the PP's appeal and convicted the respondent on all three amended charges. The respondent was sentenced to a fine of RM15,000 in default six months' imprisonment on each amended charge. **B**

[6] This is an appeal by the PP against the sentences imposed by the CA.

[7] Briefly, the facts of this case are as follows: The respondent, having first won a by-election and subsequently the general election, was elected as a member of the Dewan Undangan ('ADUN') Negeri Sembilan on 22 May 1982. In 1986, the respondent was appointed as a member of the Majlis Mesyuarat Kerajaan ('MMK') Negeri Sembilan. In the series of general elections that followed, the respondent was returned as an ADUN and retained his appointment as the member of the MMK until the amended charges were brought against him. At all relevant times, however, the respondent was an ADUN, a member of the MMK, and the Tampin District Land Committee. **C** **D**

[8] He was married to Noraini bte Abdul Satar ('Noraini') on 26 June 1981 and she remained his wife at all relevant times.

[9] On 4 November 1991, Syarikat Teraju Nusantara Sdn Bhd ('Teraju Nusantara') was set up by Abdul Wahab bin Ahmad ('Wahab'), Noraini and Milah bte Haron ('Milah'). Each of them held a share of RM1. All the three were directors of Teraju Nusantara. Milah is the wife of one Ismail bin Maarof, a draftsman at the Tampin District Land Office. Wahab is a teacher and also the senior assistant headmaster attached to the Sekolah Kebangsaan Gemencheh where Noraini was also teaching. **E**

[10] On 25 November 1991, about three weeks after Teraju Nusantara was set up, the company applied to the Tampin District Land Administrator for quarry land, the subject matter of the amended charges. **F**

[11] Working papers concerning the application were prepared on 15 December 1992 and on 21 December 1992, they were tabled before the Land Committee meeting. They were considered and recommended for approval by the MMK. The respondent attended the meeting. **G**

[12] On 28 April 1993, the MMK approved the said application. The respondent also attended the meeting.

[13] On 26 January 1994, the MMK approved an application by Teraju Nusantara for an extension of time to pay the premium on the said land. The respondent also attended this meeting. It would be observed that all the three dates mentioned above correspond with the dates mentioned in the charges. **H**

[14] On 19 May 1994, the respondent, Noraini, Wahab, Milah and her husband Ismail were brought by one Teoh Song Chuah to see Dato' Rosie Tan at her office at Hotel Pan Pacific Kuala Lumpur. Teoh Song Chuah is the **I**

Senior Manager (Treasury) of Tan Chong Motors and Dato' Rosie Tan is his superior officer at Tan Chong Motors. Dato' Rosie Tan is also the 'financier' of Syarikat Hanro Bina Sdn Bhd ('Hanro Bina').

[15] The purpose of the meeting was to discuss matters pertaining to the sale of the quarry land from Teraju Nusantara to Hanro Bina. Hanro Bina agreed to buy the said land for RM1.1 million.

[16] At the said meeting, Dato' Rosie Tan paid RM150,000 to the respondent and RM100,000 to Noraini. Wahab and Milah each received RM50,000.

[17] Before the said meeting, the respondent, Wahab, Ismail and Dato' Rosie Tan had visited the said land.

[18] On 19 July 1994, an agreement was entered into between Hanro Bina and Noraini, Wahab and Milah for the sale of their shares in Teraju Nusantara to Hanro Bina. Noraini signed the said agreement.

[19] The learned HCJ accepted all the above facts but he, nevertheless, acquitted and discharged the respondent on all the three amended charges. His sole reason for doing so was because he accepted the respondent's defence that when he (respondent) attended all the three meetings, he honestly believed that his wife, Noraini, had extinguished all her interest in Teraju Nusantara. This, according to the learned judge, had raised a reasonable doubt on the prosecution's case.

[20] As stated earlier, the CA allowed the PP's appeal and convicted the respondent on all the three amended charges and sentenced him to a fine of RM15,000 in default six months imprisonment on each amended charge.

[21] The learned deputy public prosecutor ('DPP'), appearing on behalf of the appellant in this appeal before us, argued that the sentences imposed by the CA were manifestly and grossly inadequate against the proved facts and circumstances of this case. He had urged upon this court to interfere with the sentences imposed and substitute them with sentences that reflect the gravity of the offences for which the respondent was charged and convicted.

[22] It was further submitted by the learned DPP that the CA had failed to appreciate the material put before them. As such the CA made a wrong decision as to the proper factual basis for sentence. The sentences were, therefore, wrong in principle in that they were manifestly inadequate. The CA had also erred in not appreciating that public interest would not be served by the mere imposition of a fine only for each amended charge.

[23] It was submitted by learned counsel for the respondent that the fine of RM15,000 per amended charge which represented three quarters of the maximum fine permissible under the section was apt, correct and reasonable under the circumstances.

[24] Learned counsel further argued that under s 2(1) of the Ordinance, a custodial sentence is not mandatory. The CA, according to learned counsel, had applied the correct principles of sentencing taking into consideration all the circumstances of the case against the respondent. **A**

[25] Learned counsel further contended that the CA had taken into account public interest when imposing the sentences and they were correct in their finding that differences in opinion would necessarily arise in the application of its principles. **B**

[26] To fully understand and appreciate this appeal in its proper perspective, we feel it is imperative that we highlight the salient aspects of the judgment of the CA in respect of the offences against the respondent. **C**

[27] From the facts, the CA agreed that Teraju Nusantara was established on 4 November 1991, for one purpose and one purpose only, ie to secure the said land, the subject matter of the amended charges, for quarry operations. The presence of the respondent's wife as the director of Teraju Nusantara was indeed a camouflage for the respondent's involvement in the said company. **D**

[28] Immediately three weeks after the formation of Teraju Nusantara ie on 25 November 1991, an application was made by it to the Land Office Tampin to develop the said land for quarry operations. The application was processed by the Land Administrator of the District of Tampin for the purpose of presenting it to the District Land Committee for consideration. The respondent, being an ADUN, was appointed as a member of the said Committee. **E**

[29] The working papers were prepared on 15 December 1992 and six days later, ie on 21 December 1992, they were presented, considered and approved by the Committee with a positive recommendation to the MMK. The respondent was present at the Committee's meeting. **F**

[30] On 28 April 1993, the MMK approved the application of Teraju Nusantara to conduct quarry operations on the said land. The respondent, as a member, was once again present at the meeting. **G**

[31] On 26 January 1994, the MMK approved Teraju Nusantara's application for an extension of time to pay the premium for the said land. Here again, the respondent being one of the members, was present at the meeting. **H**

[32] From the chronology of events that had taken place, it can be seen that the entire exercise ie from the formation of Teraju Nusantara to the subsequent approval of its application for quarry operations, was done over a very short period of time.

[33] It must also be noted that the company was a RM3 company and the directors as such were not business-oriented people with the necessary expertise in quarry works. **I**

[34] Against this background, we must say that the CA had, with respect, given very little attention to the insidious conduct of the respondent in respect of his role in the entire episode.

[35] It is our view that we should look at the conduct of the respondent right from the inception of Teraju Nusantara to its eventual sale in order to understand the corrupt intention.

[36] By merely focusing on the initial presence of the respondent at the various committee meetings in his capacity as the ADUN or member of the MMK, the CA, in our opinion, had viewed the offences in a very cursory manner. The effect of the respondent's conduct becomes more visible when viewed in its totality.

[37] The presence of the respondent at the meeting of the MMK held on 26 January 1994, which deliberated on the extension of time for Teraju Nusantara to pay the premiums on the said land, was again part of his nefarious design which had not been adequately considered by the CA when assessing sentence.

[38] In their judgment appearing at p 15 of Volume I of the Appeal Record this is what the CA said:

> Memohon tanah kuari itu tidak salah. (Kalau itu salah, Majlis Mesyuarat Kerajaanlah yang patut dipersalahkan). Yang salahnya, walaupun bunyinya hebat iaitu 'melakukan perbuatan rasuah', sebenarnya ialah kerana beliau berada dalam bilik mesyuarat itu semasa permohonan itu dipertimbangkan dan diluluskan. Permohonan itu boleh diluluskan tanpa kehadirannya dan dalam keadaan itu, kelulusan diperoleh juga dan beliau tidak bersalah.

In English:

> Applying for the quarry land is not wrong. (If it is wrong, then the State Executive Council should be blamed). The mistake, although it sounds grave that is 'committing a corrupt act', is actually because he was in the meeting room while the application was considered and approved. The application may be approved without his presence and in that circumstance, the approval was still obtained and he was not committing any offence.

[39] The above quoted passage once again reflects the simplistic view taken by the CA in approaching the matter. With respect, the CA in the above passage is indeed minimizing the role played by the respondent. We must reiterate that the respondent's role began with the inception of Teraju Nusantara, and concluded with the sale of it on 19 July 1994. Prior to the execution of the sale and purchase agreement, the respondent was paid RM150,000 and his wife RM100,000. To our minds, the role of the respondent stretches far beyond merely participating in the decision making process in relation to the said land.

[40] By the phrase 'Permohonan itu boleh diluluskan tanpa kehadirannya dan dalam keadaan itu, kelulusan diperoleh juga dan beliau tidak bersalah' (The application may be approved without his presence and in that circumstance, the approval was still obtained and he was not committing any offence), would mean that the CA was of the view that the application would have been approved anyway even if the respondent was not present, and in such circumstances there would have been no fault attributed to the respondent.

[41] Again, with respect to the CA, on the facts of the present case, there is not an iota of evidence to suggest that such application would have been approved even if the respondent was not present. It is mere conjecture on the part of the CA. It is not for us to speculate if such remarks as mentioned above could have erroneously influenced the minds of the CA judges when deciding on the sentence.

[42] In its judgment appearing at pp 13 and 14 of Volume I of the Appeal Record, the CA drew a distinction between the acts of corrupt practices in the case of *PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1, and that of the present case. In the former, the CA regarded the corrupt practices of the accused as a threat to public order of the country whilst in the present case, the corrupt practice of the respondent was merely in not recusing himself from the meetings which deliberated and approved the applications of the said land.

[43] Apart from understating the role played by the respondent, which we have adverted to earlier, what the CA had failed to consider is that both cases involve the abuse of office or powers of members of the administration or public officers. It cannot be gainsaid that the very purpose for which the Ordinance was designed is to curb corrupt practices of members of the administration which could by itself threaten the security of the country.

[44] We may add that every form of corrupt practice that falls within the definition of the Ordinance is a threat to national security. Hence, the conduct of the respondent and his conviction of the charges under the Ordinance are *ipso facto* threats to the security of the country even though they are not threats to public order, a factor which the CA had overlooked in its judgment.

[45] We shall now refer to p 14 of Volume I of the Appeal Record, where the CA stated thus:

> Kami tidak fikir berdasarkan fakta dan keadaan dalam kes ini, hukuman penjara perlu dijatuhkan. Pertama, kesalahan ini tidak patut disamakan dengan kesalahan-kesalahan jenayah merompak, pecah amanah, merogol dan sebagainya dan orang yang melakukan kesalahan ini tidak patut diklasifikasikan bersama-sama penjenayah-penjenayah itu.

In English:

> Based on the facts and circumstances in this case, we are of the opinion that a sentence of imprisonment should not be imposed. Firstly, this offence should not be equated with other criminal offences such as robbery, breach of trusts, rape and others and the person who commits this offence should not be classified together with such criminals.

[46] Any offence, be it murder, rape, robbery or corruption is viewed as an offence against society and the community at large. By stating that the crime of corruption stands in a league of its own and cannot be equated with the heinous crimes of murder, rape, robbery, criminal breach of trust etc, the CA has certainly underplayed the effect of corruption in our society. The offence of corruption, if unabated or undeterred, is more far reaching in its consequences than the crimes of robbery, criminal breach of trust or rape. Thus, we feel that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences.

[47] In order to appreciate and understand the legislative intent of the Ordinance, we feel it is pertinent to refer to the decision of the Federal Court ('FC') in *Haji Abdul Ghani bin Ishak & Anor v PP* [1981] 2 MLJ 230 where the court held (at p 246):

> We think we have first to examine the object of Emergency (Essential Powers) Ordinance No 22 of 1970. In *PP v Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166 at p 178 this court had occasion to consider the object of Ordinance No 22 of 1970 and said:
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> > We consider that our view accords with sound common-sense. The Emergency (Essential Powers) Ordinance No 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act.
>
> It is therefore no longer in dispute that the object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage.

[48] The FC then dismissed the appeal of the first appellant and confirmed the conviction and sentence of seven months' imprisonment imposed by the High Court.

[49] In *PP v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, the first respondent was earlier charged in the High Court for an offence of using his public office for his pecuniary advantage under s 2(1) of the Ordinance. At the close of the case for the prosecution, he was acquitted and discharged. (See [1979] 1 MLJ 166). On appeal by the PP, the FC allowed the appeal and before passing sentence this is what the FC said (at p 279):

But the offences are very serious ones and carry a sentence of imprisonment not exceeding 14 years or a fine not exceeding $20,000 or both such imprisonment and fine. Surely this country and the public must have a right to expect of its public officers a duty to conduct themselves, at all times, with the highest standards of probity and honesty and in accordance with the law. Anything less will inevitably result in loss of confidence in public administration and in the spread of the cancer of corruption in the lower levels.

Nevertheless, the trial court and this court must consider that the plans submitted were in accordance with or within the permissible dispensations of the bye-laws, the technical advisers had recommended their approval and if Datuk Tan had correctly advised himself to disqualify himself and to refer the plans to the State Authority for his action, the plans would have been passed. By not doing so he had clearly committed the offences with which he was charged but in the circumstances the pecuniary or other advantage which had accrued to him by his passing the plans was perhaps, as a matter of criminal culpability and consequence, less substantial than the case of a public officer who had pocketed money to which he had not any vestige or right to expect or demand.

In these circumstances and having regard to the unfortunate course in which this trial had been held, we do not propose to impose a sentence of imprisonment which, *prima facie*, is appropriate to an offence of corruption or corrupt practice, especially in high places.

[50] The FC then imposed a fine of RM2,000 on each of the charges on which the first respondent had been convicted.

[51] Next, we shall refer to the case of *Nunis v PP* [1982] 2 MLJ 114. In this case, the appellant, the Penang State Fire Chief, recommended to the Chairman of the Lembaga Pengurus Kerajaan Tempatan, the purchase of certain equipment from a firm wholly owned by his brother-in-law at a price higher than the price for which they could be obtained from another firm. He was charged under s 2(1) of the Ordinance but was acquitted by the President of the Sessions Court, Penang. On appeal, Abdul Hamid FCJ (as he then was) set aside the order of acquittal and substituted an order of conviction and before passing sentence, the learned judge had this to say (at p 118):

In passing sentence I have taken into consideration the submission made by Mr Balasundram counsel for the respondent, in his plea for mitigation, that the respondent was arrested in 1976 and the charge has been hanging over his head for at least six years and also the fact that all this while the respondent has been interdicted from service.

It must however be observed that the respondent has committed a very serious offence. Perhaps it would also be appropriate to say that if there is a hope for the country to have a clean and efficient administration it is essential that members of the administration should not be corrupt. Offences for corrupt practice committed by a public officer, Members of Parliament and Assemblymen must therefore be dealt with severely. Public interest demands it.

In the case of the respondent I consider the fact that this case has dragged on for some years and that he has, undoubtedly, suffered quite a lot. Nonetheless it would be against public interest if he should be let off lightly. I therefore consider it appropriate to impose imprisonment for 24 months.

[52] The next relevant authority to look at would be the case of *PP v Dato' Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245. In this case, the accused was at all material times a member of the Kedah State Executive Council. He made an application for land and was allotted a piece of land. The application was approved by the Land Committee and then forwarded to the Executive Council. At the meeting of the Executive Council which approved the application, the accused was present. The accused was charged with the offence of corrupt practice under s 2(1) of the Ordinance.

[53] In the course of his judgment (at p 247), the learned judge, Hashim Yeop A Sani J (as he then was) said:

Coming back to the fact of this case, to put it simply, the act complained of in the charge is that while being a member of the Administration the accused took part in a decision in which he was interested. From the definition of 'corrupt practice' it is clear that what the law aims to strike at is any act done by a member of the Administration or public officer whereby he has used his public position or office for his pecuniary or other advantage. In other words the law aims to strike at every act of a member of the Administration or public officer which amounts to an abuse of his public position or office for his personal advantage. The definition extends the scope of the law to include any act which is contrary to the provision of sub-s (8) of s 2 of the Eighth Schedule to the Federal Constitution or the equivalent provision in a State Constitution.

[54] Further, at p 248, his Lordship continued:

A number of witnesses both prosecution and defence said that they took no objection to the presence of the accused. In my view the fact that no one took objection to the presence of the accused at that meeting does not alter the position in law. Nor the fact that according to some witnesses his presence would have made no difference whatsoever and that the application would have been approved any way.

[55] And further, at p 249:

The aim of Ordinance 22 is to bring to book renegade politicians and public servants who abuse their public positions for private gains. I agree that there are extenuating circumstances in this case … . But an offence has nevertheless been committed. On the facts I can come to no other conclusion but that the accused took part in making the decision which benefited him personally and that in essence is the very thing which Ordinance 22 prohibits.

[56] The accused was convicted and sentenced to a day's imprisonment and a fine of RM2,000 in default six months.

[57] The next authority which merits our attention is the case of *Dato' Seri Anwar Ibrahim v PP* [2002] 3 MLJ 193. The appellant, a former deputy prime minister of Malaysia, was tried in the High Court on four charges of corrupt practice under s 2(1) of the Ordinance to wit, that he had, whilst being a member of the administration, unlawfully used his public position to his advantage by directing two senior police officers to obtain four written statements from one Azizan Abu Bakar and one Ummi Hafilda Ali denying their earlier accusations of sexual misconduct and sodomy against him, thereby saving himself from embarrassment and possible criminal proceedings. The trial judge convicted and sentenced him to six years imprisonment on each of the four counts with the sentences running concurrently from the date of his conviction *(PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 HC). The appellant's instant appeal to the FC was from the judgment of the CA *(Dato' Seri Anwar Ibrahim v PP* [2000] 2 MLJ 486 CA) affirming the decision of the trial judge in respect of both conviction and sentence.

[58] The FC dismissed the appellant's appeal against both conviction and sentence. Touching upon the appeal against sentence this is what the FC had to say (at p 494):

> It is of the utmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence. See *PP v Loo Choon Fatt* [1976] 2 MLJ 257.

[59] The FC then cited the case of *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83 and found themselves in full agreement with the statement of principle enunciated in that case.

[60] Finally the FC concluded thus:

> After considering the reasons given by the learned judge, we are satisfied that the imposition of the sentence of six years' imprisonment to commence from the date of conviction has not occasioned an error of principle or law. Therefore, we see no reason to interfere with the exercise of discretion vested in him. Accordingly, we dismiss the appeal against sentence.

[61] We have said earlier in this judgment that no distinction should be drawn between this case and the instant case before us as both involve the abuse of office or powers of a member of the administration or public officer.

[62] Finally, we shall now look at the case of *PP v Datuk Hj Sahar Arpan* [1999] 3 CLJ 427. The accused here faced three charges of having committed corrupt practice pursuant to s 2(1) of the Ordinance.

[63] The accused in this case is the former ADUN for Durian Tunggal and a member of the MMK Melaka. Sometime in February 1994, the accused, already

an ADUN and a member of the MMK, bought a company called Ivory Heights Sdn Bhd ('Ivory Heights'). Ivory Heights had sought to carry out an aquaculture project in Melaka and for that had applied for two parcels of state lands in Bertam and Bachang respectively ('the said land'). On 7 September 1994, the MMK deliberated on the application and approved the same. Thereafter, Ivory Heights applied to change the lease of the said land from 60 years to 99 years, and the MMK, having deliberated on the matter on 21 December 1994, accordingly extended the lease period of the said land. Ivory Heights then applied to expand the approved area of the land in Bertam from 3.3718 hectares to 3.6204 hectares and the land in Bachang from 6.8230 hectares to 7.2019 hectares. Again, the MMK following its meeting and deliberations on 23 August 1995, approved the said Ivory Heights' application. The facts showed, however, that the accused, in his capacity as an MMK member, was present at all the three MMK meetings aforesaid, and had never declared his interest in Ivory Heights nor left the meeting room at all relevant times. The facts also evinced that Ivory Heights, or the said land, was subsequently disposed off by the accused, with the result that at least RM500,000 had passed hands and been paid to the accused.

[64] The accused was convicted on all the three charges and was sentenced to two years imprisonment and RM20,000 fine in default six months imprisonment on each charge. The imprisonment sentences were to run concurrently.

[65] As a source of guidance, it will not be complete if we do not refer to the case of *PP v Loo Choon Fatt* [1976] 2 MLJ 256 where that learned judge Hashim Yeop A Sani J (as he then was) had occasion to say:

> In respect of sentencing there can be only general guidelines, No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.
>
> The principles to be applied in imposing sentence however are the same in every case.

[66] In considering the principles of sentencing, Lawton LJ in *R v Sargent* (1974) 60 Cr App R 74 at p 77 held:

> Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.
>
> I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however,

another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

[67] With the above principles in mind and having considered some of the examples of sentences handed down by our courts for offences under s 2 of the Ordinance, it is now encumbent upon us to identify the right sentences in this case.

[68] It is obvious from the facts that by his role in the entire episode, both the respondent and his wife had benefited financially.

[69] From the sequence of events that took place, ie from the inception of Teraju Nusantara, the application and approval of the said land for quarry purposes and finally the sale of Teraju Nusantara, it is obvious that it was a well thought out scheme by the respondent. There is clear evidence of premeditation and his part to commit a corrupt act. It was not as though the offence was committed in a moment of aberration or on the spur of the moment.

[70] The parts played by the respondent in his capacity as an ADUN and a member of the MMK in the series of meetings held to consider and approve the application of Teraju Nusantara for quarry operations show in no uncertain terms that financial advantage was foremost in the mind of the respondent. This fact is clearly supported by the evidence of the sale of the said land to Hanro Bina five months after the final approval was obtained. The sum of RM150,000 was paid to the respondent during the negotiations. Herein lies the lure and greed.

[71] In our opinion, in cases of corruption it is difficult to envisage a situation where public interest does not require the principle of deterrence to predominate. In *Lim Poh Tee v PP* [2001] 1 SLR 674, it was held that the principle of deterrence dictated that the length of the custodial sentence awarded had to be a not insubstantial one in order to drive home the message that such offences would not be tolerated; but not so much as to be unjust in all the circumstances of the case. In this regard, the culpability of the offender, the circumstances of the offence, the aggravating and mitigating factors, and the sentences imposed in similar cases would be relevant considerations.

[72] Reverting to the present appeal before us, it is our view that very little emphasis has been placed by the CA in their judgment on the aforesaid principles of sentencing.

[73] The CA had placed much emphasis on the fact that the respondent's political career is destroyed, the positions he once held lost and possibly never to be recovered and his good name tarnished. With respect, these are by no means extenuating circumstances which could attract sympathy. These in fact

A are considerations that the respondent should have in mind before he embarked upon this nefarious scheme and they certainly should not have an overwhelming effect on the sentencing process as held by the CA.

[74] As we have quoted earlier in this judgment, the aim of the Ordinance is to bring to book renegade politicians and public servants who abuse their positions. The effect of any punishment imposed is to deter politicians and public servants from conducting their public affairs in a corrupt manner. (See *PP v Dato Haji Mohamed Muslim bin Haji Othman*).

[75] It has been held that imprisonment should not be imposed if there is an alternative punishment provided by the legislation in the punishment section. However, it has equally been held that imprisonment may be the only suitable form of punishment despite the provision of an alternative punishment, in view of the gravity of the offence and to serve public interest (See *Kang Yeow Hooi & Ors v PP* [1954] MLJ 233).

[76] From the authorities we have considered earlier, there is no doubt that in cases involving corruption, imprisonment would be a proper sentence unless there are extenuating circumstances against the imposition of such a sentence. We find there is none in the present case.

[77] From the factual matrix of this case, it can be seen in no uncertain terms that the respondent, as a politician had, whilst holding a public office of some stature, used his public position to his advantage and obtained a monetary benefit as a consequence of it. The nature of the abuse is in the financial advantage that he gained from the use of his office.

[78] Having said the above, it is our unanimous decision that this appeal be and is hereby allowed. We would therefore set aside the sentences of fines imposed by the CA and in place substitute a sentence of two years imprisonment on each amended charge. The sentences are to run concurrently. The fines, if paid, are to be refunded to the respondent.

[79] My learned brother Abdul Malek Ahmad PCA and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Loo Lai Mee